Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099, and 97-1141

In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL., PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL., RESPONDENTS

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
ET AL., RESPONDENTS

**On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

OPENING BRIEF FOR RESPONDENT/CROSS-PETITIONER AMERITECH CORPORATION

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

STEPHEN M. SHAPIRO
THEODORE A. LIVINGSTON
JOHN E. MUENCH
GARY S. FEINERMAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

KENNETH S. GELLER *
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

Counsel for Respondent/Cross-Petitioner Ameritech Corporation

QUESTIONS PRESENTED

Respondent/Cross-Petitioner Ameritech Corporation will address the following questions:

1. Whether FCC Rule 315(b), which requires incumbent local exchange carriers to provide their competitors with preassembled combinations of network elements, (i) violates the plain language of 47 U.S.C. § 251(c)(3), which imposes an obligation on incumbent carriers to provide "access" to "network elements on an unbundled basis at a technically feasible point" "in a manner that allows requesting carriers to combine such elements," and (ii) destroys the statutory distinction between the unbundled network element and resale provisions of the Telecommunications Act of 1996.

2. Whether the FCC's "all elements" rule violates the statutory distinction between resale of finished telecommunications services and unbundled network elements by allowing new entrants to provide telecommunications services *entirely* through the incumbent's network elements, not at the statutory wholesale rates for resale, but at the cost-based rates reserved by Congress for competitors with some of their own facilities who purchase access to individual network elements.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the underlying proceedings are listed in the appendix to the petition for a writ of certiorari in *AT&T Corp., et al.* v. *Iowa Utilities Board, et al.*, No. 97-826, at 1a-4a, 73a-78a, 92a.

Respondent/Cross-Petitioner Ameritech Corporation has no parent corporation and no non-wholly owned subsidiaries.

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BRIEF FOR RESPONDENT/CROSS-PETITIONER AMERITECH CORPORATION

For the reasons set forth in the briefs submitted by other respondents/cross-petitioners,[1] the Eighth Circuit correctly held that FCC Rule 315(b) is inconsistent with the plain text of section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, and the structure of section 251(c) as a whole. Those briefs also demonstrate that the Eighth Circuit's decision to uphold the FCC's "all elements" rule must be reversed.

Ameritech submits this separate brief to address the central issue underlying the controversy over Rule 315(b) and the "all elements" rule. That issue is whether incumbent local exchange carriers may be required to provide new entrants with "assembled platform(s) of combined network elements" (Pet. App. 71a) — which are commonly known as "unbundled network element platforms" or "UNE platforms." The battles fought in the court of appeals and this Court over Rule 315(b) and the "all elements" rule are, in large measure, skirmishes in the larger battle over the UNE platform.

As defined by the FCC and new entrants such as AT&T and MCI, the UNE platform is a purported combination of unbundled network elements that consists of *precisely* the same facilities, in *exactly* the same configuration, as the network designed by the incumbent carrier to provide its own retail telecommunications services to customers and resale services to new entrants. Contrary to the network element entry option established by Congress in section 251(c)(3),

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[1] Ameritech Corporation endorses the arguments set forth in the Brief for Respondents/Cross-Petitioners Bell Atlantic, *et al.* ("Bell Atlantic Brief"); the Brief for Respondent/Cross-Petitioner U S WEST, Inc. ("U S WEST Brief"); and the Brief for Respondents/Cross-Petitioners the GTE Entities ("GTE Brief").

however, entrants acquiring the UNE platform would not design and establish an alternative network, would not determine the amount of network elements necessary to carry their customers' traffic, and would not make any effort even to identify the particular network elements they need. Rather, the platform would allow new entrants to use the incumbent's entire preassembled network — identical to what an entrant acquires when purchasing resale services under section 251(c)(4). Yet the platform would give new entrants such access *not* at the statutory wholesale discount mandated by Congress for the resale of retail services, but rather at the lower cost-based rates reserved for unbundled network elements. Requiring incumbent carriers to provide the UNE platform therefore would create arbitrage opportunities that undermine Congress' distinction between unbundled network elements and resale services. For these reasons and others, the UNE platform is flatly inconsistent with the 1996 Act.

Before the Eighth Circuit vacated Rule 315(b), petitioners consistently maintained that the Rule, together with the "all elements" rule, required incumbent carriers to provide the UNE platform at rates below those charged for resale services. When apprised of this gambit, the court of appeals invalidated Rule 315(b). The court explained that section 251(c)(3) "does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements" to serve local customers. Pet. App. 71a. The court added that "[t]o permit the acquisition" of the platform "at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements * * * and * * * resale." *Id.*

As we explain below, the court of appeals correctly concluded that the UNE platform is incompatible with the 1996 Act. Accordingly, this Court should affirm the Eighth Circuit's invalidation of Rule 315(b) and strike down the "all elements" rule. And even if this Court were to find that Rule

315(b) and the "all elements" rule are valid on their face, the Court should hold that the rules are invalid insofar as they require incumbent carriers to provide the UNE platform at the cost-based rates reserved by Congress for unbundled network elements.

STATEMENT

The network element issues presented here require some understanding of the basic architecture of the local telephone network. Understanding this architecture will allow the Court to appreciate the distinction between unbundled network elements available under section 251(c)(3) and resale services available under section 251(c)(4), and therefore to comprehend why the UNE platform is flatly inconsistent with the 1996 Act. The following describes the statutory distinction between unbundled network elements and resale, and traces the history of the FCC's campaign to subvert that distinction by requiring incumbent carriers to provide the UNE platform.

1. The Local Telephone Network. The local telephone network consists of several types of facilities constructed, installed, and combined by the incumbent local exchange carrier ("incumbent carrier" or "incumbent LEC"). Each customer's telephone is connected to the network by wires called "local loops." The loops connect the customer's premises to an "end office," which consists largely of a "local switch." The principal function of the local switch is to read the telephone number dialed by the calling party and, based on routing instructions programmed into the switch by the incumbent carrier to reflect its network configuration, connect the call to a transmission path so that the call reaches the called party.

If the party being called is connected to the same end office as the calling party, the local switch connects the call directly. Thus, in Figure 1, when Customer A calls Customer B, the call originates at Customer A's premises and

travels over the local loop to the end office. At the end office, the local switch routes and then connects the call to the local loop connecting the end office to Customer B's premises:

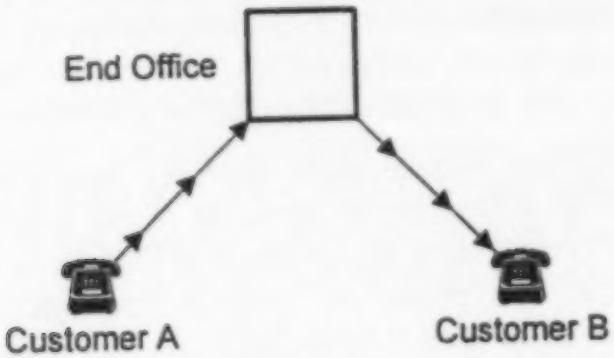

Figure 1

Most cities are served by numerous end offices. The end offices are connected to one another by "interoffice transmission facilities," which generally are fiber-optic cables that can be divided electronically into hundreds of circuits for voice and data transmission. These interoffice transmission facilities also connect end offices to one or more "tandem switches" in a hub-and-spoke-arrangement. A tandem switch directs calls from one end office to another. Tandem switches connect end offices that are not directly connected and provide an alternative means of connecting calls between customers served by different end offices that are directly connected.

The local network in a city with four end offices could look like this:

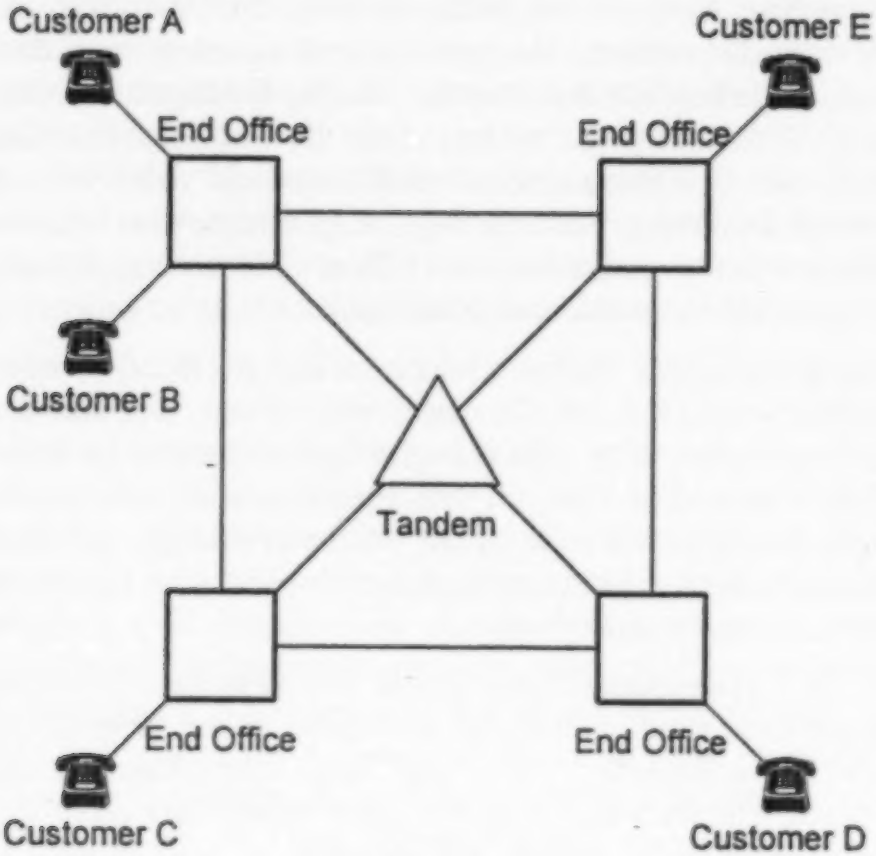

Figure 2

If the calling party and the called party are served by different end offices, the call must be "transported" from the calling party's end office to the called party's end office. The local switch uses a "routing table" — a list of steps the incumbent carrier has programmed into the switch to define how incoming calls should be handled — to select the particular physical "interoffice" pathways that will carry the call to its destination.

For example, in Figure 2, the first option for routing a call from Customer C to Customer D would be over interoffice transmission facilities directly linking their respective end offices. If that direct link is being used to capacity at the time the call is placed, the call would be routed over the

interoffice transmission facility linking Customer C's end office to the tandem, through the tandem switch, and then over the interoffice transmission facility linking the tandem to Customer D's end office. And, if Customer C called Customer E, Customer C's end office would route the call through the tandem because there is no direct route between the customers' respective end offices. More complex networks include tandem-to-tandem cables.

Accordingly, whether a telephone call is placed between customers served by the same end office, or between customers served by distant end offices connected by interoffice transmission facilities and a tandem switch, use of the local telephone network entails access to multiple facilities that have been constructed and combined into an integrated network by the incumbent.

2. **Competitive Entry Under The 1996 Act.** Congress enacted the local competition provisions of the 1996 Act to promote competitive entry into local telecommunications markets. In section 251(c), Congress established three distinct methods by which new entrants — also known as competitive local exchange carriers ("CLECs") or requesting carriers — may compete in local service markets. These three options require different levels of investment, impose different risks, and promise different rewards.

a. *Physically Constructing a New Network.* The most investment- and labor-intensive entry option is for a CLEC to build each component of its own local telephone network. This entry option requires the greatest investment in network facilities, and therefore entails the greatest risk, while promising the greatest opportunity for reward. The risk lies in the fact that a new entrant that designs and physically constructs an entire local network will not know whether it will be able to attract the customers (and, therefore, the revenue) necessary to recoup its investment.

Section 251(c)(2) of the 1996 Act facilitates entry for these new entrants by requiring an incumbent carrier to provide "interconnection" for the "facilities and equipment of" another carrier with the incumbent's network. 47 U.S.C. § 251(c)(2). Through this "interconnection," the new entrant's network is physically connected to the incumbent's network, so that the entrant's local customers can place calls to persons using the incumbent's network, and vice versa.

b. *Network Elements*. Congress "recognize[d] that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant." H.R. Rep. No. 104-458, at 148 (1996) ("Conf. Rep."). Section 251(c)(3) establishes an alternate method of entry under which a new entrant may design and establish its own network without having to construct anew all of the facilities and equipment in that network. Specifically, section 251(c)(3) permits a new carrier to lease particular "network elements" from the incumbent on an "unbundled basis at any technically feasible point," and "to combine such elements in order to provide * * * telecommunications service." 47 U.S.C. § 251(c)(3). The 1996 Act defines "network element" as "*a* facility or equipment used in the provision of a telecommunications service," including "features, functions, and capabilities that are provided by means of *such* facility or equipment." *Id.* § 153(45) (emphasis added). That is, a "network element" is a particular building block ("facility or equipment") that the incumbent makes available separately to a new entrant, so that the new entrant can put together its own network to provide its own retail service to customers.

A CLEC that leases one or more unbundled network elements from an incumbent designs and establishes its own alternative, competing network without having to construct each facility from scratch. The new entrant simply combines unbundled network elements leased from the incumbent with other facilities (whether constructed by the entrant or

acquired from elsewhere) in order to provide local telephone service over its alternative network. See S. Rep. No. 104-23, at 19-20 (1995) ("unbundled access to the local exchange carrier's telecommunications facilities" is necessary to ensure "the interoperability of *both carriers' networks*") (emphasis added); *First Report and Order*, ¶ 441 ("[b]y unbundling various [network elements], a new entrant can purchase [network elements] on an unbundled basis as part of a *competing local network*") (emphasis added) (J.A. 97).[2] Under section 251(c)(2), such an entrant then would "interconnect" its own alternative network with the incumbent's existing network.

For example, consider a small telecommunications carrier with an advanced local switch but no local loops. To establish its own alternative network, that firm could lease local loops and then interconnect its local switch to the incumbent's tandem switch. Or consider a cable television provider that already has laid wires (loops) to its customers' homes and built a fiber-optic transport network covering a certain geographic region. That provider could establish its own alternative network by leasing local switches and a tandem switch from the incumbent.[3] The cable provider then could interconnect the leased local and tandem switches with the facilities it previously constructed to provide local service over its own network.

Although these two new entrants would lease different unbundled network elements, they would share certain characteristics common to all carriers that enter local service

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[2] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order (rel. Aug. 8, 1996) ("*First Report and Order*").

[3] See Conf. Rep. at 148 ("Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.").

markets through unbundled network elements. In particular, both entrants would design and establish an alternative, competing local network by leasing network elements from the incumbent to fill the gaps between facilities they already have constructed or acquired from elsewhere. The FCC and commentators alike have recognized this distinguishing attribute of the network element entry option. See *First Report and Order*, ¶ 14 ("many new entrants will not have fully constructed their local networks when they begin to offer service. Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities") (J.A. 414); Sidak & Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 Colum. L. Rev. 1081, 1082 (1997) (new entrant using unbundled network elements "can build its own network on an à la carte basis, leasing some inputs from the incumbent LEC and procuring other inputs from rivals already in the market * * * or directly from equipment vendors").

Congress specified a rate structure for leasing unbundled network elements that reflects the network-building nature of the network element entry option. The rates for access to a network element are to be "based on the cost" to the incumbent of providing that element. 47 U.S.C. § 252(d)(1).

Properly implemented, the "network element" mode of entry carries *some* risks and requires *some* investment, but not to the extent faced by new entrants that physically construct each facility in their own networks. For example, a new entrant may decide to serve a customer with an unbundled local switch leased from the incumbent carrier. If the customer then "migrates" to a different carrier, the entrant may terminate the lease and thereby limit its financial exposure (and hence its financial risk). By contrast, if the new entrant had acquired its own new local switch, it would have incurred sunk costs that could be neither recouped nor

limited if the customer subsequently migrated to a different carrier.

c. *Resale*. "Resale" entry is the least risk- and labor-intensive of the three options established by Congress. Section 251(c)(4) allows a new entrant to buy, at a wholesale discount, complete telecommunications services from the incumbent carrier — using precisely the same configuration of facilities and equipment that the incumbent carrier uses to provide local retail services — and then resell those services in competition with the incumbent.

In contrast to the first two methods of entry, CLECs that engage in "resale" do not design an alternative network or make *any* up-front investment in leased or constructed facilities. See H.R. Rep. No. 104-204, at 77 (1995) (unlike resellers, CLECs using network elements "offer[] * * * [a] competitive alternative" to the incumbent's network). When a new entrant buys an incumbent's finished service for resale, it uses the same local network already constructed and combined by the incumbent. Accordingly, a "reseller" relies upon the incumbent to design the entire local telephone network used by the entrant's customers and to determine how calls are switched or transported throughout the network.

The 1996 Act establishes a rate structure for the incumbent's "resale" services that differs markedly from the cost-based rate structure for network elements. Section 252(d)(3) provides that a new entrant may buy the incumbent's retail services at "wholesale" prices, a term defined by Congress as the incumbent's "retail rates" less the "marketing, billing, collection, and other costs that will be avoided" by the incumbent carrier in selling its services at wholesale rather than retail. 47 U.S.C. § 252(d)(3). The Eighth Circuit correctly recognized that the cost-based rates for unbundled network elements are lower than the wholesale rates for resale services. Pet. App. 54a-57a. As the Bell Atlantic, U S WEST and GTE Briefs explain in detail, the wholesale rates

for resale services are higher because they are calculated by taking a discount from the incumbent's *retail* rates (which reflect universal service cross-subsidies), while the rates for network elements are based on the *cost* to the incumbent of providing each individual element.

Nonetheless, by mandating a wholesale discount for the incumbent's retail services, Congress guaranteed a margin for new carriers entering through the "resale" route that makes "resale" an extremely low-risk entry option. Not only is the CLEC relieved of any need to invest in network facilities, but it can acquire customers first, and then purchase from the incumbent only the amount of retail services necessary to serve those customers.

3. The FCC's Network Element Regulations. The FCC implemented section 251(c) of the Act in its *First Report and Order*. That Order generally defined network elements to "correspond to distinct network facilities." *First Report and Order*, ¶ 678 (J.A. 137). Thus, the FCC defined the "local loop," "switching," and "interoffice transmission facilities" to be separate unbundled network elements. 47 C.F.R. § 51.319(a), (c), (d). In so doing, the FCC noted that Congress required Bell operating companies to provide these elements separately as a precondition for providing long distance services. *First Report and Order*, ¶¶ 377, 410, 439 (J.A. 71-72, 84-85, 96-97), citing 47 U.S.C. §§ 271(c)(2)(B)(iv) ("[l]ocal loop transmission from the central office to the customer's premises, *unbundled* from local switching"), 271(c)(2)(B)(vi) ("[l]ocal switching *unbundled* from transport [and] local loop transmission"), 271(c)(2)(B)(v) ("[l]ocal transport from the trunk side of a wireline local exchange carrier switch *unbundled* from switching") (emphasis added). The FCC's regulations permit new entrants to lease these and other network elements from the incumbent. See 47 C.F.R. § 51.319.

a. *Combinations*. In addition to defining which types of network elements an incumbent LEC must lease to

new entrants, the FCC also addressed how leased elements may be combined with other network elements or with facilities built by the new carrier. One such regulation permits new entrants to combine unbundled network elements with facilities constructed or otherwise acquired by the new entrant, or with other leased elements, and thereby to design an alternative network for providing local service to its customers. 47 C.F.R. § 51.315(a) ("Rule 315(a)"). Rule 315(a) states that an incumbent carrier "shall provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service." Therefore, if the cable television operator described above seeks to combine the local loops it has installed with an unbundled local switch leased from the incumbent, the incumbent would have to provide the switch "in a manner that allows" the *cable operator* to combine its loops with the unbundled switch.

Rule 315(a) plainly complies with — and in fact tracks the second sentence of — section 251(c)(3). However, despite its claims to the contrary, the FCC went far afield from the statute in promulgating two other requirements related to combining network elements. *First*, the FCC required incumbents to combine, at the new entrant's request, network elements that are *not* currently combined in the incumbent's network. 47 C.F.R. § 51.315(c)-(f) ("Rules 315(c)-(f)"). That is, if a new entrant ordered two or more network elements that were not physically connected, Rules 315(c)-(f) obligated the incumbent to combine those elements on behalf of the new entrant.

Second, the FCC required incumbent carriers to provide new entrants with preassembled, or existing, combinations of network elements. 47 C.F.R. § 51.315(b) ("Rule 315(b)"). Rule 315(b) reads: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." That is, Rule 315(b) gave new entrants the right to order, on a preassembled basis, two

or more network elements that were currently combined in the incumbent's network. Like Rules 315(c)-(f), Rule 315(b) relieves "requesting carriers" of their statutory obligation "to combine [network] elements" themselves. 47 U.S.C. § 251(c)(3).

b. *The "All Elements" Rule.* As described previously (pp. 7-9, *supra*), the network element entry option permits new entrants to fill the gaps in their own previously acquired facilities by leasing selected network elements from the incumbent on an unbundled basis. However, the FCC read section 251(c)(3) to permit a new entrant to acquire from an incumbent, at cost-based rates, *all* of the network elements necessary to provide a local telecommunications service. *First Report and Order*, ¶¶ 328-41 (J.A. 57-65). Put another way, the "all elements" rule allows a new carrier to provide local service entirely through a combination of unbundled network elements. Under the "all elements" rule, then, a new entrant may use the network element entry option even if it has constructed no network facilities of its own.

4. The Eighth Circuit's Initial Ruling. Incumbent carriers brought petitions for review to challenge, *inter alia*, Rules 315(c)-(f) (which required incumbents to combine network elements on behalf of new entrants) and Rule 315(b) (which required incumbents to provide preassembled combinations of network elements). The incumbent LECs argued that these rules violated the plain language of section 251(c)(3), which grants access to network elements only "on an unbundled basis" at "any technically feasible point" and specifies that *new entrants* have the obligation to combine network elements. The incumbent LECs also maintained that requiring incumbents to provide certain network elements combinations — in particular, a preexisting combination consisting of all of the elements required to provide a retail service — would destroy the distinction between the network element and resale entry options under sections 251(c)(3) and (c)(4).

a. *Combinations.* In a ruling that petitioners did not challenge in their petitions for certiorari, the Eighth Circuit invalidated Rules 315(c)-(f). The court of appeals explained that these Rules were contrary to the plain text of Section 251(c)(3), which requires incumbent carriers to provide "'unbundled network elements in a manner that allows *requesting carriers to combine* such elements.'" Pet. App. 70a (quoting 47 U.S.C. § 251(c)(3)) (emphasis added by Eighth Circuit). The statutory text "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and therefore "cannot be read to levy a duty on the incumbents to do the actual combining of elements" on behalf of new entrants. *Id.* The court's initial opinion left Rule 315(b) in place, without comment.

b. *The "All Elements" Rule.* At the same time, and based upon its vacatur of Rules 315(c)-(f), the Eighth Circuit upheld the "all elements" rule, which permits new entrants to provide local service entirely through unbundled network elements leased from the incumbent carrier. The incumbent carriers had maintained that new entrants would use the "all elements" rule to evade the distinctions between access to network elements under section 251(c)(3) and resale services under section 251(c)(4). Addressing those concerns, the Eighth Circuit held that the network element mode of entry differs from resale entry in critical respects, with "unbundled access ha[ving] several disadvantages that preserve resale as a meaningful alternative." Pet. App. 56a.

First, the court of appeals observed that, unlike pure resellers, new entrants providing local service entirely through network elements must "expend[] valuable time and resources recombining unbundled network elements." Pet. App. 57a. This distinction followed from the court's vacatur of Rules 315(c)-(f). As the court explained, "requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications indus-

try and simultaneously makes resale a distinct and attractive option." *Id.* at 56a-57a. In other words, a new entrant providing local service entirely through network elements still must design and establish its own alternative network, while a reseller simply relies on the same preexisting local telephone network used by the incumbent to provide service to its own customers.

Second, the Eighth Circuit noted that a new carrier "entering the local telecommunications markets by purchasing unbundled network elements faces greater risks than those carriers that resell an incumbent [carrier's] services." Pet. App. 56a. Carriers leasing unbundled network elements "must make an up-front investment that is large enough to pay for the cost of acquiring access to all of the unbundled elements of the incumbent LEC's network * * * without knowing whether consumer demand will be sufficient to cover such expenditures." *Id.* By contrast, a reseller can "more easily match its supply with its demand because it can purchase telephone services from incumbent LECs on a unit-by-unit basis," and thus "is able to purchase only as many services (or as much thereof) as it needs to satisfy customer demand." *Id.* That is, an entrant leasing network elements as a means of providing service over its own competing network faces demand-contingent risks — risks that are not faced by carriers that simply resell the retail service provided by the incumbent over the incumbent's network.

Thus, although it upheld the "all elements" rule, the court of appeals recognized Congress's intent that to qualify for the lower cost-based prices applicable to unbundled network elements, a new entrant must be more than a passive reseller of the incumbent's retail services.

5. The Controversy Over The "UNE Platform." As noted above, the Eighth Circuit's initial ruling did not address Rule 315(b), which provided that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). In

the weeks that followed the court of appeals' ruling, the FCC and new entrants such as AT&T and MCI seized upon the survival of Rule 315(b) to advance an agenda that — in defiance of the Eighth Circuit's initial ruling — would have obliterated the statutory distinction between the unbundled network element and resale entry options.

In proceedings before State public utility commissions, AT&T maintained that Rule 315(b), together with the "all elements" rule, permitted new entrants to obtain the so-called "UNE platform" as a purported combination of network elements under section 251(c)(3). As defined by petitioners, the UNE platform is not an alternative, competing network that a new entrant establishes by combining unbundled network elements with facilities already owned by the new entrant. Rather, the platform consists of *precisely* the same facilities, configured in *exactly* the same manner, as the integrated local telephone network that the incumbent designed and constructed to provide its own retail services — the same retail services available to new entrants for resale under section 251(c)(4). In fact, the platform *is* the incumbent's integrated local telephone network.

As AT&T acknowledged, the UNE platform is particularly attractive because it can be acquired on an "as is" basis. That is, if AT&T served a customer with a resale service purchased under section 251(c)(4), AT&T would have the right instantaneously to "convert" that customer to the UNE platform under section 251(c)(3). Likewise, if AT&T won over one of the incumbent carrier's current retail customers, it could instantaneously "migrate" that customer to the UNE platform.[4] As AT&T put it, migration to the UNE

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[4] See Comments of AT&T Communications of Ohio Regarding the Effect of the Eighth Circuit Order, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997) (arguing that Rule 315(b) requires "as is" migration to the UNE platform) ("AT&T Ohio Comments on Eighth Circuit Initial Order"). Accord, Comments of MCI Telecommunications on

platform is appropriate "for Ameritech retail customers who want to keep *the same type of service* * * * but simply want to switch local service providers from Ameritech to AT&T." In those circumstances, AT&T added, "no physical changes are necessary and no interconnection charge will be assessed."[5]

To accomplish these "as is" conversions and migrations to the UNE platform, a CLEC would not have to design an alternative network, combine unbundled network elements, make up-front investments in network elements, or even identify the particular network facilities (apart from the customer's local loop) used to carry the customer's telecommunications traffic. All the CLEC would have to do is utter the words "UNE platform" rather than "resale." As AT&T conceded, however, the actual product delivered would be the same: *undifferentiated use of the entire preexisting and integrated network designed by the incumbent carrier to provide retail services to its local customers.*

AT&T has been remarkably candid — at least to investment analysts — as to why it seeks to affix the "UNE platform" label, rather than the "resale" label, to its use of the incumbent's preexisting and preconfigured network. As John Zeglis, AT&T's current president, proclaimed, the UNE platform gives AT&T "another way to resell" the incumbent's retail services, but at a discount greater than that applicable to resale services under the 1996 Act.[6] Mr. Zeglis

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the Impact of the Decision of the Eighth Circuit, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997) (relying upon both Rule 315(b) and the "all elements" rule).

[5] AT&T's Memorandum Contra to Ameritech Ohio's Application for Rehearing and Request for Stay, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 25-26 (filed May 4, 1998) (emphasis added).

[6] Transcript, AT&T Investment Community Meeting (Mar. 3, 1997) (comments of John Zeglis) (J.A. 255).

observed that while the wholesale discount for resold services in one State is only 25.9%, the UNE platform may be acquired at "a discount of 52 percent" or higher, depending upon a customer's particular calling patterns. The difference in price has absolutely nothing to do with the actual product sold by the incumbent LEC to the new entrant, since the UNE platform and the preassembled network used by the incumbent to provide resale services are one and the same.

Despite the Eighth Circuit's initial ruling, which held that the CLECs themselves must combine the unbundled network elements they lease from incumbent LECs, AT&T cobbled together a strained legal rationale to support the platform. Specifically, AT&T argued to State commissions that Rule 315(b), in tandem with the "all elements" rule, allowed new entrants to acquire all of the network elements necessary to provide retail service, and further prohibited the incumbent LECs from separating facilities that are already combined in their networks. AT&T claimed that because an incumbent carrier "currently combined" all of the facilities necessary to serve its own retail customers, Rule 315(b) required the incumbent to provide those facilities to CLECs as an "existing combination[]" of purported unbundled network elements at no extra charge.[7] Therefore, AT&T contended, new entrants could obtain the incumbent's retail services, not as a resale service under section 251(c)(4), but at lower rates as a preassembled UNE platform under section 251(c)(3).

While AT&T was pressing State commissions to use Rule 315(b) and the "all elements" rule as a means of approving the UNE platform, the FCC issued orders expressly

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[7] AT&T Ohio Comments on Eighth Circuit Initial Order, at 8. See also *Eighth Circuit's Order May Imperil FCC Enforcement, Triggers Call to Revive Rules*, Telco Competition Report (July 31, 1997) (despite Eighth Circuit's initial order, "the UNE platform is [not] dead") (statement of Mark Rosenblum, AT&T Vice President-law and public policy).

intended to advance that agenda. In the *Third Reconsideration Order*,[8] promulgated in the same docket as the regulations at issue here, the FCC required incumbent carriers to provide new entrants with a purported network element dubbed "shared transport." Although petitions for review challenging the *Third Reconsideration Order* remain pending before the Eighth Circuit, that order illustrates the extent to which the FCC abused the (temporary) survival of Rule 315(b) in an effort to require incumbent carriers to provide the UNE platform.

The *Third Reconsideration Order* (¶ 34 (J.A. 244-245)) defines shared transport as a purported network element consisting of *every* interoffice transmission facility in the incumbent's network — each of which had previously been defined in the *First Report and Order* as a network element in its own right.[9] The regulation relieved new entrants of any obligation to design their own alternative networks, or even to identify or designate which *particular* individual interoffice facilities would carry their customer's traffic. *Id.* ¶ 43 ("shared transport" need not be "identified as a limited or pre-identified portion of the network") (J.A. 246-247). The FCC acknowledged that shared transport could function only in combination with switching network elements also ac-

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[8] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) ("*Third Reconsideration Order*") (J.A. 1359-1402), petitions for review pending, *Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-3389 *et al.* (8th Cir.).

[9] See *First Report and Order*, ¶ 442 ("it is technically feasible for incumbent LECs to unbundle * * * interoffice facilities as individual network elements") (J.A. 97); *id.* ¶ 441 ("by unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis *as part of a competing network*, or it can combine its own interoffice facilities with those of the incumbent") (emphasis added) (J.A. 97).

quired from the incumbent, but, expressly relying upon Rule 315(b), required incumbents to provide shared transport as part of a preassembled combination with switching. *Id.* ¶¶ 44, 47 (J.A. 247-249). Accord, *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC 97-298, ¶¶ 327-28, 336 (rel. Aug. 19, 1997). Thus, according to the FCC, shared transport gives new entrants undifferentiated use of the entire preassembled and integrated combination of each and every interoffice transport facility, tandem switch, and local switch in the incumbent's network. Or, as AT&T recently conceded, shared transport is "the use of [the incumbent carrier's] public switched network to carry traffic from point to point."[10]

There can be no question that the FCC promulgated the *Third Reconsideration Order* to give CLECs the right to acquire the UNE platform at the cost-based rates reserved for unbundled network elements. As then-FCC Chairman Reed Hundt made clear, the shared transport requirement "highlights the importance [the FCC] place[s] on incumbents making available to new entrants their network elements on a combined basis — a combination sometimes referred to as the UNE platform." *Third Reconsideration Order*, Separate Statement of Chairman Reed Hundt (J.A. 250).[11]

6. The Eighth Circuit's Order On Rehearing. Several incumbent LECs filed petitions for rehearing with the Eighth Circuit. The petitions informed the court of appeals

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[10] AT&T Communication of Michigan's Brief in Support of its Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative, for Summary Judgment at 1 n.1, *Michigan Bell Tel. Co.* v. *Strand*, Case No. 5:98-CV-20 (W.D. Mich.) (filed April 20, 1998).

[11] Accord, Evaluation of the United States Department of Justice, CC Docket No. 97-137 (FCC), at 34 (filed June 25, 1997) ("shared transport * * * [is] needed to support entry through the 'network platform'").

of the events described above, in particular that the FCC, together with CLECs such as AT&T, had relied on the survival of Rule 315(b), together with the "all elements" rule, to require incumbent LECs to provide the UNE platform at the cost-based rates reserved by Congress for unbundled network elements. This regulatory action, the incumbent LECs charged, nullified key provisions of the 1996 Act and was at odds with the court's initial opinion.

The rehearing petitions asked the court of appeals to invalidate Rule 315(b). Alternatively, the petitions urged the Eighth Circuit to reconsider its earlier affirmance of the "all elements" rule. If Rule 315(b) stood, the petitions maintained, the premises underlying the court's prior affirmance of the "all elements" rule (see pp. 14-15, *supra*) would disappear. And if the FCC and AT&T were correct in asserting that Rule 315(b) authorized CLECs to acquire the UNE platform, CLECs would simply use the incumbent's entire preexisting network, rather than design and combine alternative, competing networks of their own. This, in turn, would destroy the distinction between the unbundled network element and resale entry options fashioned by Congress.

The Eighth Circuit granted the petitions for rehearing. Amending its initial opinion, the court of appeals vacated Rule 315(b) as "contrary to § 251(c)(3)," given that "the rule would permit the new entrant access to the incumbent['s] network elements on a bundled rather than an unbundled basis." Pet. App. 71a. The court reaffirmed its prior ruling that the plain language of Section 251(c)(3) "requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." *Id.* In so doing, the court directly considered and invalidated the UNE platform, holding that section 251(c) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)." *Id.* The court explained that "[t]o permit such an

acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinction Congress has drawn in subsections 251(c)(3) and (4)" between access to unbundled network elements and the purchase of an incumbent's retail services for resale. *Id.*

SUMMARY OF ARGUMENT

In striking down Rule 315(b), the court of appeals held that section 251(c)(3) of the 1996 Act "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements * * *." Pet. App. 71a. Yet petitioners' defense of Rule 315(b) barely mentions the UNE platform, let alone their persistent campaign to require incumbent LECs to provide the platform at the cost-based rates reserved by Congress for unbundled network elements.

Although petitioners understandably are reluctant to address the point, the battle over Rule 315(b) and the "all elements" rule was and remains, in principal part, a battle over the UNE platform. Petitioners want this Court to reverse the Eighth Circuit's vacatur of Rule 315(b), and affirm the Eighth Circuit's approval of the "all elements" rule, because they believe that those rulings would allow CLECs to acquire the UNE platform. Indeed, the Eighth Circuit invalidated Rule 315(b) only upon learning that petitioners — most notably, the FCC, AT&T and MCI — had employed Rule 315(b), together with the "all elements" rule, in an effort to require incumbent carriers to provide the UNE platform under the guise of a combination of unbundled network elements. The Court could not render an informed and complete judgment without appreciating these crucial and undeniable facts.

The UNE platform would be a dead letter if this Court affirmed the Eighth Circuit's invalidation of Rule 315(b), or if it reversed the Eighth Circuit's decision to uphold the "all elements" rule. However, even if the Court were to conclude

that Rule 315(b) and the "all elements" rule were valid in some instances, it should hold that the rules would violate the 1996 Act insofar as they required incumbent LECs to provide the UNE platform at the cost-based rates reserved for unbundled network elements. This is so for two principal reasons.

First, the UNE platform obliterates the distinction between the unbundled network element and resale entry options established by Congress in sections 251(c)(3) and (c)(4), and thus undermines the structure of section 251(c). The UNE platform is identical to resale in several critical respects. Both allow new entrants to compete without designing and establishing an alternative network; both give new entrants identical access to the same configuration of network facilities used by the incumbent to provide retail service to its customers; and both relieve new entrants of the need even to identify which particular facilities will carry their customers' traffic. The only difference is price: by affixing the "UNE platform" label, as opposed to the "resale" label, to the undifferentiated use of the incumbent's preassembled network, the new entrant receives the benefit of the lower cost-based rates reserved by Congress for unbundled network elements. The effect of the UNE platform, then, is to nullify the resale provisions of the Act.

Second, the UNE platform is inconsistent with the plain language of section 251(c)(3). If a CLEC were to acquire the UNE platform, it would not obtain "access" to "network elements" "on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). Obtaining "access" to network elements "at a technically feasible point" unquestionably requires a new entrant to obtain some sort of *physical* access to the incumbent's network facilities. Moreover, the UNE platform is not a combination of *unbundled* network elements, even under petitioners' unduly restrictive definition of "unbundled," because a CLEC does not have the option

of acquiring one essential component of the UNE platform without taking another essential component.

ARGUMENT

I. The UNE Platform Undermines The Structure Of Section 251(c) By Subverting The Statutory Distinction Between Access To Unbundled Network Elements And Resale.

As described above (see pp. 6-11, *supra*), the 1996 Act establishes three distinct methods by which carriers may enter the local telecommunications market. *First*, new entrants may build an alternative local network from scratch, and interconnect that network with the incumbent's network. 47 U.S.C. § 251(c)(2). *Second*, an entrant may design and establish an alternative network with unbundled network elements acquired from the incumbent carrier. *Id.* § 251(c)(3). Consistent with the network-building nature of this entry option, Congress provided that the rate for network elements must be "based on the cost" to the incumbent "of providing the * * * network element." *Id.* § 252(d)(1). *Third*, a new entrant may use the incumbent carrier's entire preassembled network by acquiring the incumbent's actual retail services at a wholesale discount and reselling those services to customers. *Id.* § 251(c)(4). Because these entrants simply resell the incumbent's services, they need not design an alternative network to serve their customers. In light of the distinction between the resale and network element entry options, Congress based the wholesale discount for resale services not on cost to the incumbent of providing the service, but on the incumbent's retail rates, minus certain avoided costs. *Id.* § 252(d)(3). As the court of appeals recognized, the cost-based rates for network elements are lower than the wholesale rates for resale services. Pet. App. 54a-57a.

The UNE platform would make nonsense out of this statutory scheme. The UNE platform is the undifferentiated

use of the *same* entire preassembled network used by the incumbent carrier to provide retail services — the *same* retail services available for resale under section 251(c)(4). See pp. 16-20, *supra*. A CLEC acquiring the UNE platform does not have to engage in the tasks that distinguish the network element entry option from the resale entry option: designing and establishing an alternative network; calculating the volume of unbundled interoffice transmission facilities necessary to handle its anticipated traffic volume; identifying which particular network elements would carry its customers' traffic; assuming the risk that it will miscalculate traffic volumes and not recoup its investment in network elements; or combining the elements into an alternative network. The only difference between the UNE platform and resale is price: by substituting the phrase "UNE platform" for "resale," CLECs such as AT&T and MCI hope to obtain the same retail services at the lower cost-based rates reserved for network elements, rather than at the wholesale discount mandated by Congress for resale services.

At the time it enacted the 1996 Act, Congress plainly understood that each incumbent carrier already had designed and constructed a fully functioning, preassembled, integrated network to provide service to its local customers. See 47 U.S.C. §§ 251(c)(4), 271(c)(2)(B)(xiv). Congress required incumbents to make available *those* finished retail services to new entrants for resale under section 251(c)(4), and mandated a wholesale discount for that product under section 252(d)(3). If new entrants could acquire that very same product under the guise of a preassembled combination of purportedly unbundled network elements under section 251(c)(3), at the lower cost-based rates established by section 252(d)(1), Congress's inclusion of the resale provision in the 1996 Act would be meaningless. Reading the 1996 Act in that manner would run contrary to "the cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute * * * rather

than to emasculate an entire section." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997) (internal quotation marks omitted); see also *Bailey* v. *United States*, 516 U.S. 137, 145-46 (1995); *Smith* v. *Robinson*, 468 U.S. 992, 1011 (1984).

The UNE platform undermines the structure of section 251(c), and nullifies the 1996 Act's resale provisions, in at least three respects.

1. The first conflict between the UNE platform and the terms of the 1996 Act concerns the nature of the platform as a telecommunications product. That product is the incumbent carrier's preexisting, bundled network used to provide retail service to the incumbent's customers — *the identical product available for resale under section 251(c)(4)*. At the same time, the UNE platform is absolutely inconsistent with the network element entry vehicle established in section 251(c)(3). New entrants providing service with unbundled network elements do not simply re-use the incumbent's preassembled network; rather, Congress expected them to establish their own alternative networks to serve their customers. See 47 U.S.C. § 251(c)(3) (incumbent carrier "shall provide such unbundled network elements in a manner that allows *requesting carriers* to combine such elements in order to provide [a] telecommunications service") (emphasis added); S. Rep. No. 104-23, at 19-20 (1995) ("unbundled access to the [incumbent] local exchange carrier's telecommunications facilities" necessary to ensure "the interoperability of *both carriers' networks*") (emphasis added). As Congress recognized, CLECs using network elements "offer[] * * * a competitive alternative" to the incumbent's network in a manner that resellers do not. H.R. Rep. No. 104-204, at 77 (1995).

Establishing an alternative network requires, at a minimum, that the new entrant identify and designate the particular network facilities — *i.e.*, unbundled network elements, facilities constructed anew or acquired from elsewhere by the entrant — that will carry its customers' traffic. Yet the

essential nature of, and principal justification for, the UNE platform is that it *relieves* entrants of these very obligations — obligations that serve to distinguish network element entry under section 251(c)(3) from resale entry under section 251(c)(4). To make the UNE platform available under section 251(c)(3) would eviscerate this congressionally mandated distinction. See *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979) (adhering to the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

MCI maintains that the UNE platform is distinct from resale because a new entrant acquiring the UNE platform, unlike a reseller, must "create" and "bill for" "the network it builds out of the leased elements." MCI Br. 23. That argument is frivolous. The UNE platform does not require the new entrant to "create" or "build[]" anything, because it gives entrants access to the incumbent carrier's entire preassembled, bundled network. See pp. 16-20, *supra*. Indeed, MCI elsewhere has acknowledged that the UNE platform consists of "facilities [that] are all interconnected components of the existing Ameritech network and are used to provide exchange access service to end-user customers."[12] With respect to the need to "bill for" services, a new entrant must bill its customers regardless of whether it provides service through the network element entry option or the resale entry option. Contrary to MCI's contention, then, the network configuration used when a new entrant requests the "UNE platform" is indistinguishable from the network configuration used when the entrant requests a "resale service."

2. The UNE platform also undermines the 1996 Act's provisions governing price. By requiring incumbent carriers

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[12] Memorandum of MCI Telecommunications Corporation and MCI Access Transmission Services, Inc. Contra Ameritech's Third Application for Rehearing, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6 (filed May 4, 1998).

to sell their entire preassembled, integrated network under the guise of the UNE platform, the FCC fostered arbitrage strategies that eliminate the statutory distinction between unbundled network elements and resale. With the UNE platform, a new entrant acquires use of the incumbent's preassembled network at the lower cost-based prices reserved by section 252(d)(1) for unbundled network elements, rather than at the statutory wholesale discount established in section 252(d)(3) for resale services. Moreover, as envisioned by petitioners, CLECs may pay for the UNE platform primarily on an after-the-fact usage-sensitive basis, just as a reseller pays for resale services.[13] Thus, the court of appeals was entirely correct in concluding that the UNE platform would "obliterate" the distinction between the network element and resale entry options prescribed by Congress. Pet. App. 71a.

The CLECs themselves have touted the UNE platform's pricing anomalies as its principal virtue. As noted above, AT&T President Zeglis noted that, in one State, the section 252(d)(3) wholesale discount applicable to section 251(c)(4) resale services is 25.9%. By contrast, the UNE platform version of the same services — which Mr. Zeglis assumed would be available under section 251(c)(3) at the cost-based rates established by section 252(d)(1) — could be acquired at an effective discount of 52%. Thus, according to AT&T, an incumbent carrier must make available the preassembled, integrated network through which it provides retail services *either* (a) under the label "resale," at a 26% discount, *or* (b) under the label "UNE platform," at an effective 52% discount. See pp. 17-18, *supra*.

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[13] See AT&T/MCI Joint Application for Rehearing and/or Clarification, Case No. 96-922-TP-UNE (Pub. Util. Comm'n of Ohio), at 8-9 (filed July 21, 1997) (urging PUCO to "order Ameritech to provide interoffice transport * * * on a usage sensitive basis"). The FCC announced that it will "establish usage-sensitive rates for recovery of shared transport costs" in any interconnection arbitrations it conducts under section 252(e)(5) of the 1996 Act. *Third Reconsideration Order*, ¶ 30 (J.A. 243-244).

Neither AT&T nor its allies have ventured to explain why Congress would have enacted an elaborate statutory scheme governing distinct network element and resale entry options, only to give new entrants the "choice" between a 26% discount and a 52% discount for the very same product. Petitioners show no respect for Congress's judgment in advocating such a construction of the 1996 Act. And this Court should "not be disposed to give the statute a meaning that produces such strange consequences." *Deal* v. *United States*, 508 U.S. 129, 134 (1993).

MCI's solution to this dilemma is simply to deny that the UNE platform enjoys an inherent "economic advantage" over resale. MCI Br. 23-24. MCI's point appears to be that a new entrant would *not* receive a lower price for the incumbent's retail service when it utters "UNE platform" rather than "resale service." But this argument flatly contradicts what the CLECs have acknowledged in other forums. As noted previously, AT&T has made no bones about the fact that the UNE platform gives new entrants a far deeper discount for the incumbent's retail services than the wholesale discount mandated by Congress in section 252(d)(3). Indeed, MCI and AT&T have attempted to justify their withdrawal from the local residential market on the theory that the statutory discount for resale services is somehow insufficient, and that it is feasible to compete only if the incumbent's resold services are available under the label of the "UNE platform" at the lower cost-based rates reserved for network elements under section 252(d)(1).[14]

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[14] AT&T Communications of Illinois, Inc.'s Response to Motion for Stay of Illinois Bell Telephone Company, Docket No. 96-0486/0569 (Ill. Comm. Comm'n), at 10 (filed March 18, 1998) ("Experience has shown that CLECs cannot enter the market via resale of [the incumbent LEC's] local service on a financially viable basis."); Transcript, Remarks at the National Press Club (Jan. 22, 1998) (claiming that "[c]urrent resale discounts make it impossible for any competitor to ever make money selling local in any state in America") (statement of Timothy F. Price, MCI President).

Despite MCI's claims to the contrary, then, the "economic advantage" that the UNE platform affords over resale is the only reason why CLECs such as AT&T and MCI want the UNE platform so badly. The bottom line is that these carriers are dissatisfied with the wholesale discount established in section 252(d)(3) for new entrants that simply wish to resell the incumbent's retail services. Of course, if AT&T and MCI believe that the wholesale discount established by Congress for resold services is too meager, they should seek redress from Congress.[15] See *MCI* v. *AT&T*, 512 U.S. 218, 234 (1994). Instead, these carriers petition the Court to allow them to have their cake and eat it too: they want to obtain the incumbent's resold services under the guise of the UNE platform, thereby obviating the need to establish their own alternative networks, at the lower cost-based rates applicable to unbundled network elements. This the 1996 Act does not allow.

3. Finally, the UNE platform would allow the large long distance carriers to evade the 1996 Act's joint marketing restrictions. Section 271(e)(1) provides that large long distance carriers such as AT&T and MCI may not "jointly

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[15] MCI's and AT&T's unjustified complaints about the 1996 Act's wholesale discount for resale services have been rejected by the current Chairman of the FCC. See *Kennard Says Competition in Residential Telephony is Top Priority on 1998 Agenda*, TeleCompetition Report (Feb. 12, 1998) ("When asked about the recent claims by AT&T Corp. and MCI * * * that reselling residential local service is not viable, [FCC Chairman] Kennard said he didn't 'fully understand why not. * * * USN [Communications, Inc.] is providing local competition exclusively through resale. There are companies out there doing it.'"); Krause, *Computers & Technology Kennard's Call Is Implementing Telecom Reform*, Investor's Business Daily (Feb. 18, 1998) ("'Yes, I'm aware that the large (long-distance carriers) have backed away from a resale strategy. But some smaller [new entrants] haven't backed away from resale, and it seems to be viable for some new entrants.'") (statement of Chairman Kennard). In fact, Ameritech has provided new entrants with over 500,000 resold lines, approximately 55% of which are residential.

market" their long distance services with local services acquired from Bell operating companies under the 1996 Act's resale provisions. 47 U.S.C. § 271(e)(1) (prohibition expires three years after enactment of 1996 Act or in States where Bell company is authorized to provide long distance services). Congress enacted this provision "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services." S. Rep. 104-23, at 43 (1995). This joint marketing restriction applies *only* to carriers that resell the incumbent's local services; large long distance companies that offer local service via the network element entry option are *not* covered. *First Report and Order*, ¶ 335 (J.A. 61-62).

The UNE platform would permit the large long distance carriers to nullify section 271(e)(1). The platform allows CLECs to resell the incumbent carrier's retail services under the guise of a purported combination of unbundled network elements. Thus, if AT&T were to affix the "resale" label to its resale of a Bell company's retail services, the joint marketing restriction would apply. However, according to petitioners, AT&T could evade that restriction simply by affixing the "UNE platform" label to the identical resale of a Bell company's retail services. The UNE platform, then, would nullify not only section 251(c)(4), but also section 271(e)(1), and is inconsistent with the 1996 Act for that reason as well. See *Rake* v. *Wade*, 508 U.S. 464, 471 (1993) ("We generally avoid construing one provision in a statute so as to suspend or supersede another provision.").

In sum, petitioners' campaign to require incumbent carriers to provide the UNE platform — a drive dependent upon Rule 315(b) and the "all elements" rule — is a blatant attempt to subvert the 1996 Act's clear distinction between unbundled network elements and resale.

II. The UNE Platform Does Not Provide A New Entrant With "Access To Network Elements On An Unbundled Basis At Any Technically Feasible Point."

Section 251(c)(3) requires incumbent carriers to "provide * * * nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). While the UNE platform may be a preassembled combination of the incumbent carrier's *facilities*, it plainly is *not* a combination of *unbundled network elements* within the meaning of section 251(c)(3). *First*, because new entrants acquire the UNE platform on an "as is" basis, they do not obtain "access" to network elements at a "technically feasible point." *Second*, because a new entrant *must* take essential components of the UNE platform together as an integrated whole, and does not have the option of taking those components separately, the platform is not a combination of *unbundled* network elements *even* under petitioners' unduly restrictive definition of "unbundled."

A. The UNE Platform Does Not Give A New Entrant "Access" At A "Technically Feasible Point" To Network Elements.

Section 251(c)(3) requires incumbent carriers to provide "nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point*." 47 U.S.C. § 251(c)(3) (emphasis added). The term "at any technically feasible point" — which MCI (MCI Br. 14) and the FCC (FCC Br. 43) omit from their respective recitations of section 251(c)(3) — undeniably has a physical dimension. The noun "point" refers to a physical place in the physical world. The adjective phrase "technically feasible" makes sense only in the context of obtaining actual *physical* access to a network element.[16]

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[16] The FCC's *First Report and Order* adopted this understanding of the statutory text: "We conclude that the term 'technically feasible' refers solely

The UNE platform does not give a new entrant physical access to network facilities at *any* point, let alone at a "technically feasible point." As described previously (see pp. 16-20 & 25-28, *supra*), the UNE platform allows CLECs to use the precise preassembled combination of network facilities that comprises the incumbent's entire local network. Thus, in acquiring the UNE platform, a new entrant obtains use of the incumbent's network as a bundled, amalgamated whole. There is no need for the entrant to design an alternative network, designate or request any particular facilities to carry its customers' telecommunications traffic, or combine leased network facilities with one another. Indeed, to CLECs like AT&T, the principal benefit of acquiring the UNE platform on an "as is" basis (see pp. 16-18, *supra*) lies in the fact that the UNE platform does not require a new entrant to obtain physical access to *any* specific facilities in the incumbent's network.

That feature of the UNE platform, however, is precisely what renders it invalid under section 251(c)(3). Because the UNE platform does not give a new entrant "access * * * at any technically feasible point" to network elements, the platform is "flatly inconsistent" with the terms of the 1996 Act. *Maislin Indus.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

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to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by section[] * * * 251(c)(3) include modifications to incumbent [carrier] facilities to the extent necessary to accommodate * * * access to network elements." *First Report and Order*, ¶ 198 (J.A. 34). This passage plainly demonstrates the FCC's understanding that new entrants will obtain physical access to unbundled network elements. That is the only context in which it would make sense to speak of the "technical and operational concerns," or of the "modifications to incumbent [carrier] facilities," involved in granting access to network elements. See also *id.* ¶¶ 202-204 (J.A. 34-37).

B. The Components Of The UNE Platform Are Not "Unbundled" Network Elements, Even Under The Unduly Restrictive Definition Of "Unbundled" Advocated By Petitioners.

There is an independent reason why the UNE platform is not a combination of unbundled network elements within the meaning of section 251(c)(3). The statute requires incumbent carriers to provide "access" to network elements "on an unbundled basis." 47 U.S.C. § 251(c)(3). The UNE platform, however, is not a combination of "unbundled" network elements under *any* definition of "unbundled." If, as the court of appeals correctly held, the term "unbundled" in section 251(c)(3) means physically separated, the UNE platform obviously could not be a combination of "unbundled" facilities. And even if, as petitioners incorrectly maintain, two physically connected network elements may be "unbundled" when a new entrant has the ability to acquire one of the elements but not the other, the UNE platform — which allows a new entrant to share the incumbent's network facilities in their current configuration — *still* is not a combination of "unbundled" network elements. For example, as the FCC has acknowledged, a new entrant does not have the option of taking the shared interoffice transmission component of the UNE platform without *also* taking the local switching component of the platform.

1. The Bell Atlantic, U S WEST and GTE Briefs cogently explain why the Eighth Circuit correctly concluded that incumbent carriers cannot be required to provide assembled network element combinations. Section 251(c)(3) requires that the new entrant itself physically combine network elements leased from the incumbent. Thus, as the court of appeals ruled, the term "unbundled," understood in the context of section 251(c)(3) as a whole, means physically separated as well as separately priced. The FCC, at least originally, shared this understanding: "the terms 'access' to network elements 'on an unbundled basis' mean that incum-

bent [carriers] must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee." *First Report and Order*, ¶ 268 (J.A. 43). It necessarily follows that the FCC and CLECs such as AT&T and MCI are wrong to characterize the UNE platform — *i.e.*, the incumbent's preassembled, integrated network — as a combination of "unbundled" network elements under section 251(c)(3). See *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself").

2. Petitioners argue vigorously that to be "unbundled," a network element need not be physically separated from adjacent network elements. As AT&T puts it, "[t]o provide something on an unbundled basis is * * * simply to state a different price for it and *to give users the option of declining to purchase it as part of a package.*" AT&T Br. 38-39 (emphasis added). See also MCI Br. 19 (the "normal meaning" of "unbundled" is "'*separately available* at a separate price'") (emphasis added); FCC Br. 44 ("the term 'unbundle' * * * denote[s] giving someone a *choice* of elements at separate prices") (emphasis added). That is, petitioners contend that two physically connected network elements may be "unbundled" within the meaning of section 251(c)(3) if a new entrant has the ability, if it so desires, to acquire one of the elements but not the other. See AT&T Br. 39 (to provide network components on an "unbundled" basis, incumbent carrier must "give customers the option of declining to obtain the unbundled component in combination with the [incumbent's] other * * * facilities").

Petitioners' strained interpretation of the statutory term "unbundled" is incorrect for the reasons set forth in the Bell Atlantic, U S WEST and GTE Briefs. However, even assuming *arguendo* that petitioners were correct, the UNE platform *still* could not be characterized as a combination of "unbun-

dled" network elements under section 251(c)(3). The reason is plain.

The UNE platform is the existing preassembled combination of equipment and facilities that the incumbent LEC uses to provide retail telecommunications service to its customers. As petitioners have acknowledged (see p. 20 & n.11, *supra*), a CLEC cannot acquire the UNE platform without leasing the incumbent carrier's entire interoffice transmission network. And whether the incumbent's entire interoffice transport network is viewed as a single network element or an integrated combination of separate network elements, the FCC has correctly recognized that a CLEC sharing use of that transport network "must also take local switching" from the incumbent. *Third Reconsideration Order*, ¶ 47 (J.A. 249). Moreover, it is undisputed that interoffice transmission and local switching are separate network elements. See 47 U.S.C. §§ 271(c)(2)(B)(v) ("[l]ocal transport" is transport "from the trunk side of a * * * switch unbundled from switching"), 271(c)(2)(B)(vi) ("[l]ocal switching" is switching "unbundled from transport").

The bottom line is that CLECs acquiring the UNE platform do not have the option of obtaining the interoffice transmission component of the platform without also taking the local switching component of the platform. Thus, even accepting petitioners' erroneous contention that the term "unbundled" in section 251(c)(3) means only that a new entrant has the *option* of obtaining a network element without also taking adjacent network elements, the UNE platform still cannot be considered a combination of *unbundled* network elements. It necessarily follows that incumbent LECs may not be compelled to provide the UNE platform under section 251(c)(3) at the cost-based rates reserved by Congress for unbundled network elements. See *Brown* v. *Gardner*, 513 U.S. 115, 122 (1994) (Court will not defer to agency interpretation of statute that "flies against the plain language of the statutory text").

There is an additional reason why the UNE platform is not a combination of *unbundled* network elements within the plain meaning of section 251(c)(3). That provision obligates incumbent carriers to provide unbundled network elements only if it is "technically feasible" to do so. 47 U.S.C. § 251(c)(3). But the FCC has conceded that an incumbent carrier providing shared local transport facilities separately from local switching would court disaster: "an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch." *Third Reconsideration Order*, ¶ 44 (J.A. 248). Ameritech agrees: if a CLEC purchasing the UNE platform exercised its "option" to receive separately the switching and transport facilities that the incumbent carrier currently combines and uses, the local telephone network would crash. It therefore is technically infeasible to give CLECs the option to acquire the components of the UNE platform separately from one another. See *First Report and Order*, ¶ 203 ("[n]egative network reliability effects are necessarily contrary to a finding of technical feasibility") (J.A. 36). Thus, the text of section 251(c)(3) squarely precludes imposing upon incumbent LECs an obligation to provide the UNE platform.

III. The Policy Justifications Advanced By Petitioners In Favor Of The UNE Platform Are Both Irrelevant And Invalid.

In defending Rule 315(b) before this Court, petitioners barely address the UNE platform. This is no surprise. Although Rule 315(b) is central to petitioners' efforts to obtain the UNE platform, actually addressing the platform would have compelled petitioners to explain how it could possibly be consistent with the distinction drawn by Congress between the unbundled network element and resale entry options.

MCI makes a feeble effort to justify the UNE platform. It does so by attacking what it calls the Eighth Circuit's

"policy rationale" for holding that new entrants may not obtain the UNE platform under section 251(c)(3). MCI Br. 22-26. MCI's characterization of the court of appeals' decision is incorrect. As demonstrated in the Bell Atlantic, U S WEST and GTE Briefs, the Eighth Circuit rested its decision entirely upon the text of section 251(c)(3) and the structure of section 251(c) as a whole, not on its view of what constitutes sound public policy. See Pet. App. 71a. There can be no question that the court of appeals fully appreciated its responsibilities under *Chevron*. *Id.* at 8a ("We must defer to administrative agency interpretations only if they are consistent with the plain meaning of a statute or are reasonable constructions of ambiguous statutes * * * [O]ur review does not encompass any determination regarding the wisdom or prudence of the policies Congress set forth in the Act * * *") (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-45 (1984)). Accord, *MCI* v. *AT&T*, *supra*, 512 U.S. at 229.

Rather, it is MCI that seeks refuge in policy arguments to validate the UNE platform. Those arguments, of course, are irrelevant, given that the UNE platform is prohibited by the statutory text and structure of section 251(c). See *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 188 (1994) ("[p]olicy considerations cannot override * * * the text and structure of the Act"); *LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("[o]ur task is to apply the text, not to improve upon it").

Even if they were somehow relevant, MCI's policy arguments are meritless. In essence, MCI maintains that the Eighth Circuit's invalidation of the UNE platform "handicap[s]" the network element entry strategy and "compel[s] market participants to compete through inefficient means." MCI Br. 26. The only strategy hindered by the court of appeals, however, is that of the largest long distance carriers to acquire the incumbent carriers' resale services on the cheap. This is a view shared not only by incumbent

carriers like Ameritech, but also by new entrants that have actually invested in new network facilities and combined those facilities with unbundled network elements. Those new entrants, in fact, have praised the Eighth Circuit's decision as a boon for carriers seeking to compete for customers via the unbundled network element entry option.

For example, the CEO of Brooks Fiber, a facilities-based entrant operating in Ameritech's region, declared that new local entrants "'owe[] a debt of gratitude to the Eighth Circuit. * * * The fact that there will be no free ride' for interexchange [*i.e.*, long distance] carriers seeking a cheap method of local market entry is a 'plus for our industry.'"[17] Time Warner, another facilities-based entrant, warned that making the UNE platform available to CLECs would "discourag[e] investment in alternative networks which, over the long-term, will be the most significant competition to [incumbent carriers]."[18] In sum, the UNE platform is not essential to, but in fact is destructive of, facilities-based competition through the network element entry option. The

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[17] *ALTS Members Tout 'Year of the CLEC'*, Telco Competition Rep. (Nov. 20, 1997) (quoting James Allen).

[18] Comments of the Ohio Cable Telecommunications Ass'n and Time Warner Communications of Ohio, L.P., Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 4, 6 (filed Aug. 25, 1997). Accord, *RHCs as wholesalers: As competitors become customers, RHCs are staffing up to serve them*, Telephony (Jan. 5, 1998) ("'Facilities-based [new entrants] have put a lot of money into the ground,' says Cindy Schonhaut, ICG's senior vice president for government and external affairs. 'If someone can buy [the incumbent's] network at substantially lower rates, that's not going to * * * help us recoup our investment.'"); Time Warner Communications Mem. In Support of Petitions for Rehearing at 8 (8th Cir. filed Oct. 1, 1997) ("If the advocates of [the UNE platform] prevail, then only the illusion of local competition will have been created * * * resulting in a reallocation of revenues and earnings between and among the incumbent [carriers] and the major interexchange carriers who have chosen to enter the local market by reselling * * * platforms of network elements which have been combined into complete services by the [incumbent carriers].").

platform would give AT&T and MCI a grossly unfair competitive advantage not only over incumbent carriers, but also over smaller new entrants that have chosen to invest in new network facilities and design alternative networks with the help of unbundled network elements.

In the end, there is no need for the Court to choose sides in the policy debate over the UNE platform. Congress has resolved that dispute through the text and structure of the 1996 Act, which preclude a CLEC from acquiring an incumbent's entire preassembled network configuration while avoiding the statutory provisions applicable to resale. It follows that the Eighth Circuit correctly held that section 251(c)(3) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements" as a cut-rate substitute for resale. Pet. App. 71a. This Court should confirm that section 251(c)(3) does not permit CLECs to acquire the UNE platform at the cost-based rates reserved for unbundled network elements.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it vacates Rule 315(b), and reversed insofar as it upholds the "all elements" rule. If this Court determines that Rule 315(b) and the "all elements" rule are valid on their face, the Court should hold that the rules are invalid to the extent they require incumbent LECs to provide the UNE platform at the cost-based rates reserved for unbundled network elements.

Respectfully submitted.

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

KENNETH S. GELLER *
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

STEPHEN M. SHAPIRO
THEODORE A. LIVINGSTON
JOHN E. MUENCH
GARY S. FEINERMAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

* *Counsel of Record*

Counsel for Respondent/Cross-Petitioner Ameritech Corporation

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